Supreme Court, U.S.
FILED
MAY 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

87-1930

No. _____

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1988

SELMA SMITH,

Petitioner,

vs.

FIRST NATIONAL BANK OF ATLANTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH COURT

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QUESTIONS PRESENTED

1. Does the erosion in the reliability and utility of F.R.C.P., Rule 36 to the Federal Bar caused by the circumvention and misapplication of F.R.C.P., Rule 36(b) by other Circuit Courts of Appeal, and more particularly by the Circuit Court of Appeals in this case by allowing for withdrawal of admissions pursuant to F.R.C.P., Rule 36(b) when such withdrawal caused a delay in the Plaintiff's exercise of discovery of over two years and caused a loss of evidence vital to Plaintiff for proof of her case, invoke certiorari.

2. Does the question of whether the Fair Credit Reporting Act applies to business institutions who commercially publish false credit information about their own

transactions or experiences with their customers when they know that the credit information being published is false, invoke certiorari especially when the Eleventh Circuit Court of Appeals has answered this question in the negative.

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SELMA SMITH,
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The Petitioner, Selma Smith, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above entitled proceeding on February 26, 1988.

Opinions Below

The last opinion of the Eleventh Circuit Court of Appeals in this case affirming the District Court is reported at Smith v. First National Bank of Atlanta, 837 F.2d 1575 (11th Cir. 1988) and is reprinted in Appendix A hereto. The first opinion of the Eleventh Circuit Court of Appeals in this case reversing and remanding to the District Court is unreported, and is reprinted in Appendix B hereto. The last Order of the United States District Court for the Northern District of Georgia (Tidwell, D.J.) denying Plaintiff's motion to reinstate Rule 36 admissions and granting Defendant's motion for summary judgment is unreported and is reprinted in Appendix C hereto. The second Order of the United States District Court for the Northern District of Georgia (Tidwell, D.J.) granting

respondent permission to withdraw its admissions is unreported and is reprinted in appendix D hereto. The first Order of the United States District Court for the Northern District of Georgia (Tidwell, D.J.) granting respondent permission to withdraw the admissions and granting respondent summary judgment is unreported and is reprinted in Appendix E hereto.

Jurisdiction

Invoking federal jurisdiction under 15 U.S.C.A. §1681(p), the Respondent had this case removed from a state court to the Federal District Court for the Northern District of Georgia. After allowing Respondent permission to withdraw admissions made pursuant to F.R.C.P., Rule 36 which

Petitioner had relied upon to her detriment, the Federal District Court granted Respondent summary judgment.

Petitioner appealed to the Eleventh Circuit Court of Appeals which Court affirmed the District Court on February 26, 1988, making the conclusory finding that Petitioner had not proved that withdrawal of the Rule 36 admissions would prejudice her.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit Court of Appeals is invoked under 28 U.S.C.A. 1254(1) by the filing of this timely Petition For Writ Of Certiorari.

Statutes Involved

Title 15 U.S.C.A. § 1681a(d):

The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 1681b of this title. The term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report; (B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device; or (C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosures to the consumer required under section 1681 of this title.

Title 28 U.S.C.A., F.R.C.P. Rule 36(b):

> **Effect of admission.** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

STATEMENT OF THE CASE

The Defendant, First National Bank of Atlanta, (hereinafter referred to as "the Bank") mailed an unsolicited application for a VISA card to Plaintiff, Selma Smith, (hereinafter referred to as "Smith") to her prior address under her prior name of Selma Woody. Smith's ex-husband forged her name to the application and returned it to the Bank. Without Smith's knowledge, the Bank issued VISA cards in both Smith's name and her ex-husband's name.

This VISA account became delinquent and in June of 1984 a VISA Accounts Collector at the Bank telephoned Smith and requested that Smith pay on the account. Smith informed the Collector that she had never signed anything pertaining to a VISA card and that she had no responsibility for paying on the account.

Approximately a week later the Collector telephoned Smith again and the previous conversation was repeated. Smith avers that in their conversations the Collector had always argued with her that the account was hers and had always demanded payment.

After receiving these telephone calls from the Collector, Smith reported to her local Sheriff's Department that her name had been forged on a VISA application to the Bank. In July of 1984 a Sheriff's Investigator telephoned the Bank and informed it that Smith's name had in fact been forged to an application for a VISA card at the Bank.

When Smith learned through her local credit bureau that the Bank was continuing to commercially publish a report that she was delinquent on a VISA account, she mailed a letter to the Bank on August 9, 1984 giving

notice of the forgery and asking that the false credit report be retracted. Smith never received any inquiry or response from the Bank with regard to this letter. The Bank acknowledges that it did receive the letter.

Despite both Smith's and the Sheriff's Investigator's efforts to notify the Bank of the forgery, the Bank continued to commercially publish in June, July, August and September of 1984 computer tapes reporting that Smith was delinquent in paying on a VISA account.

When Smith realized that she was powerless in stopping the Bank from making these false credit reports she retained an attorney. After Smith's attorney corresponded with the Bank a retraction of the false credit report was finally made on September 10, 1984.

Smith initiated this action by filing her Complaint against the Bank in the Superior Court of Troup County, Georgia alleging violations of the Federal Fair Credit Reporting Act, invasion of privacy, and libel. Smith had the Complaint along with a Request For Admission of Matters and a Request for the Production of Documents served upon the Bank on October 10, 1984.

The Bank filed a timely Answer to the Complaint along with a Petition for Removal removing the action to the Federal District Court for the Northern District of Georgia. The Bank never responded to either of Smith's discovery requests during the entire discovery period.

The Bank admitted each of Smith's request for admissions by its failure to make any response. Taken as a whole, the thirty-six admissions covered all elements

Smith would have to prove to establish her claims against the Bank, including the amount of damages. It was Smith's intention in serving such comprehensive request for admissions with the Complaint to learn what issues would be in dispute at the very outset of the discovery period. This would have allowed Smith to limit her discovery to only those disputed matters requiring proof.

In reliance upon the admissions, Smith did not pursue discovery which otherwise would have been directed at the matters concluded by the admissions. Shortly before the discovery period expired Smith filed her motion for summary judgment based upon the admissions.

Some seven months after the request for admissions had been filed, after Smith had filed her motion for summary judgment and after the discovery period had expired, the

Bank for the first time sought to withdraw some of the admissions by a motion. Immediately thereafter the Bank filed its own motion for summary judgment contending that if it was allowed to withdraw the admissions it would be entitled to summary judgment. Smith could oppose the Bank's motion for summary judgment with only the admissions since she had relied upon the admissions by not pursuing discovery which otherwise would have been necessary.

In her response to the Bank's motion for summary judgment Smith sought additional discovery time pursuant to F.R.C.P., Rule 56(f) by averring that she had relied on the Bank's admissions by not pursuing necessary discovery. The Bank opposed Smith's Rule 56(f) request for additional discovery.

The District Court allowed the Bank to withdraw the admissions and did in the very

same Order grant the Bank's motion for summary judgment. (infra, App. E. 22). Smith's Rule 56(f) request for additional discovery was not granted. On appeal, the Eleventh Circuit Court of Appeals reversed and remanded the case to the District Court to apply F.R.C.P., Rule 36(b) to the Bank's motion to withdraw. (infra, App. B).

Immediatley upon remand the Bank moved for additional discovery time for Smith and temporarily withdrew its motion for summary judgment. Smith opposed the Bank's request for additional discovery since it was made almost two years after the time limit for such request as set by the District Court's own local court rules. It was Smith's contention that being forced to prove her case through discovery coming over two years late would prejudice her pursuant to Rule 36(b).

The District Court did not rule upon the Bank's request for additional discovery. Instead, the District Court forced Smith to consent to additional discovery by informing Smith that the motion to withdraw the admissions would be granted with or without additional discovery time.

The District Court entered an Order once again allowing the Bank to withdraw its admissions based upon the finding that Smith had not proven that withdrawal would prejudice her. The Order allowed Smith two additional months of discovery. (infra, App. D).

During the additional discovery period Smith learned that crucial evidence had been lost due most probably to the over two year delay in the discovery process. Because evidence crucial to her case had been lost Smith moved the District Court to reinstate

the admissions. The District Court denied this motion ruling that Smith had failed to show how prejudice would result to her because of the lost evidence. (infra, App. C 3-7).

The Bank once again moved for summary judgment and the District Court once again granted the motion. (infra, App. C). The motion was granted as to Smith's Fair Credit Reporting Act claims based upon the finding that the Bank was not acting as a "credit reporting agency" as defined by the Act. (infra, App. E 14).

Upon appeal the Eleventh Circuit Court of Appeals affirmed without addressing any of Smith's specific contentions of Rule 36(b) prejudice. The Court of Appeals made the conclusory finding that there was nothing in the record showing that the District Court erred in finding that no prejudice would

result to Smith from withdrawal of the admissions. The Eleventh Circuit also affirmed the District Court's grant of summary judgment. (infra, App. A).

REASONS FOR GRANTING THE WRIT

I.

THE EROSION IN THE RELIABILITY AND UTILITY OF F.R.C.P., RULE 36 TO THE FEDERAL BAR CAUSED BY THE CIRCUMVENTION AND MISAPPLICATION OF F.R.C.P., RULE 36(b) BY OTHER CIRCUIT COURTS OF APPEAL AND MORE PARTICULARLY BY THE CIRCUIT COURT OF APPEALS IN THIS CASE NECESSITATES A GRANT OF CERTIORARI.

This Court has insured the reliability and enforceability of each of the pre-trial discovery devices found in Rules 30, 31, 33, 34 and 35 through its encouragement of the

use of sanctions in Rule 37 for the failure to respond to such discovery devices. See Roadway Express, Inc. v. Piper, 447 U.S. 752, 65 L.Ed. 2d 488, 100 S.Ct. 2455 (1980); National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 49 L. Ed. 2d 747, 96 S.Ct. 2778 (1976). However, Rule 37 offers no enforcement device to insure or compel compliance with Rule 36. The only remedy for a failure to timely respond to Rule 36 request for admissions is that the matters are automatically deemed admitted under Rule 36(a). In 8 Wright & Miller Federal Practice & Procedure, §2265 at Pg. 747 it is noted that:

> [t]he motion to compel discovery provided by Rule 37(a) does not apply to a failure to respond to a request for admissions. The automatic admission from a failure to respond is a sufficient

remedy for the party who made the request.

The remedy provided by Rule 36 of the automatic admission is subject to the right to withdraw admissions pursuant to Rule 36(b). To insure that parties can safely use and rely upon admissions, Rule 36(b) provides that withdrawal can be had only if no prejudice will result to the party relying upon the admissions. If parties seeking to use Rule 36 cannot depend upon the Courts to uphold the express guarantee that they will not suffer prejudice because of withdrawal of admissions, there can be no safe use of Rule 36. In the Notes of the Advisory Committee on Rules, 1970 Amendment to Rule 36 it was stated that:

> Unless the party securing an admission can depend on its binding effect, he

> cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admissions, and the purpose of the rule is defeated.

As one of the influences to the 1970 Amendment of Rule 36, Professor Ted Tinman, noted in Finman, The Request For Admissions in Federal Civil Procedure, 1962, 71 Yale L. J. 371, 422:

> [e]asy withdrawal, however, no less than free contradiction, would make reliance on admissions impossible and thus would tend to destroy the value of Rule 36.

There is evidence that parties are using request for admissions infrequently. See 8 Wright & Miller Federal Practice and Procedure, §2252 pg. 704 footnote #16. Undoubtedly, many litigants are uncertain

about the enforcement of Rule 36 by the Courts and with good reason. One District Court recently admitted that the test for withdrawal of admissions in Rule 36(b) has not been "firmly established". Szatanek v. McDonnell Douglas Corporation, 109 F.R.D. 37, 40 (W.D.N.Y. 1985). The Federal Courts of Appeal have eroded the value and reliability of Rule 36 by actively trying to circumvent the clear test for withdrawal found in Rule 36(b).

For example, the Seventh Circuit Court of Appeals has affirmed a decision allowing for withdrawal of admissions even where no motion to withdraw the admissions was ever made, as is specifically required by Rule 36(b). Gardner v. Southern Railway Systems, 675 F.2d 949 (7th Cir. 1982). Of course, a party has no opportunity to offer proof of Rule 36(b) prejudice if withdrawal is allowed

without the required motion. In Gardner the Court affirmed the decision granting withdrawal, although no motion to withdraw was made, finding that a motion to amend the answer to the complaint was equivalent to a motion to withdraw the admissions.

In a case which was cited by the Eleventh Circuit Court of Appeals with approval in the opinion in this case, the Fifth Circuit Court of Appeals affirmed the granting of a motion to withdraw admissions not made until the close of the evidence, not because no prejudice would result to the party relying upon the admission, but for the sole reason that the admission was inadvertently made. Reyes v. Vantage Steamship Co., Inc., 672 F.2d 556 (5th Cir. 1982). The Eighth Circuit Court of Appeals has reversed a District Court for abusing its discretion in refusing to allow for

withdrawal of admissions when such motion was not filed until two months before trial was scheduled to begin. Gutting v. Falstaff Brewing Corporation, 710 F.2d 1309 (8th Cir. 1983). The Gutting Court found that no prejudice was proven since the party obtaining the admissions admitted that it had continued to pursue discovery of the matters covered by the admissions. After acknowledging that this additional discovery was pursued only after the motion to withdraw was denied and only because the party obtaining the admissions was uncertain about the court's position regarding the admissions, the Court stated that pursuing such discovery may have been "prudent" despite the admissions. Id. 1314 footnote #5. It should be noted that, contrary to the Gutting opinion finding that the District Court abused its discretion in refusing

withdrawal of admissions, the Second Circuit Court of Appeals has stated that, "[b]ecause the language of the Rule is permissive, the Court is not required to make an exception to Rule 36 even if both the merits and prejudice issues cut in favor of the party seeking exception to the rule". Donovan v. Carls Drug Company, Inc., 703 F.2d 650, 652 (2nd Cir. 1983). Thus the Second Circuit interprets Rule 36(b) as giving the District Court absolute discretion in refusing a motion to withdraw admissions.

Other courts have reached different results in their application of Rule 36(b). The First Circuit Court of Appeals has reversed a District Court for allowing for withdrawal of admissions when the motion was not made until trial even though the admissions established over $200,000 in damages. Brook Village North Associates v.

General Electric Company, 686 F.2d 66 (1st Cir. 1982). The Ninth Circuit Court of Appeals has affirmed a District Court's refusal to allow for withdrawal when the motion to withdraw was not made until trial finding that trial courts must be cautious in allowing for withdrawal of admission. 999 v. C.I.T. Corporation, 776 F.2d 866, 869 (9th Cir. 1985).

Because Rule 36 is a vital component to the pre-trial discovery process, this Court should act to preserve its utility. Rule 36 is unique among all of the other discovery devices in its crisp ability to define and limit the controversy among the litigants. Depositions and interrogatories are not particularly helpful in definition and limitation of the controversy since the questioned party has the opportunity of composing the reply. With Rule 36 admissions

the questioning party limits the reply by simply making a statement and having the other party either admit or deny it. Equivocal or elusive answers can be given at depositions or to interrogatories but not to request for admissions.

Rule 36 offers litigants the opportunity to limit and define the issues in a case at the very beginning of the discovery process to prevent expending time and incurring expense in doing discovery of matters which are not controverted. Litigants, courts and ultimately justice benefit from such definition and limitation of the issues.

This case offers this Court the opportunity to insure the preservation of Rule 36 in a useful form. This Court can through this case assure litigants that the test for withdrawal of admissions in Rule 36(b) has meaning and must be complied with

before admissions can be withdrawn. By granting certiorari in this case, this Court can insure the reliability and enforceability of Rule 36 as it did for Rules 30, 31, 33, 34, and 35 with its decisions regarding Rule 37 sanctions in Roadway and National Hockey League, supra. Considering the unique and overwhelming evidence of prejudice caused by reliance upon admissions in this case, it is doubtful that a better case will arise for this Court to instruct upon the test for withdrawal of admissions in Rule 36(b).

In this case, Smith proved Rule 36(b) prejudice by showing that she was forced to do the discovery necessary to prove her case over two years after such discovery would have been done without the admissions, that crucial evidence vital to the proof of her case was lost because of the over two year delay in doing discovery, and that the entire

proceedings of the case were delayed by over two years because of the withdrawal of the admissions.

After the Bank first attempted to withdraw its admissions in May of 1985, Smith sought additional discovery time pursuant to Rule 56(f). Smith needed additional discovery because she had relied on the admissions in not pursuing necessary discovery and she could not adequately respond to the Bank's motion for summary judgment. The District Court did not grant Smith's Rule 56(f) request and instead granted the Bank's motion to withdraw the admissions and motion for summary judgment in the same order. (infra, App. E). After reversal and on remand from the Court of Appeals, the Bank made a belated request for additional discovery time for Smith. This additional discovery period finally began in

January of 1987.

Before the additional discovery period began the District Court determined that Smith would not suffer any prejudice pursuant to Rule 36(b) as a result of her reliance upon the admissions since she could not prove that specific evidence was lost by the admissions. (infra, App. D 2). Of course, it was completely impossible for Smith to know what specific evidence had become unavailable. Since she refrained from inquiry in reliance upon the admissions, and since the District Court did not grant her Rule 56(f) request for additional discovery, Smith never even learned what evidence had been available. There was no way for Smith to have known what evidence was lost.

In many instances difficulty in proving a loss of specific evidence arises because when a party relies upon an admission by not

doing discovery to prove the admitted matter, he most likely will not know what evidence has been lost since he never learned what evidence was originally available. See Finman, The Request For Admissions In Federal Civil Procedure, 1962, 71 Yale L. J. 371, 424.

The only way Smith could have known what evidence had been lost was for her to have originally gone ahead and done complete discovery despite the admissions. There would be no purpose to obtaining Rule 36 admissions if parties cannot safely rely upon such admissions without going ahead and doing the discovery necessary to prove the matters covered by the admissions to learn what evidence is available.

Inevitably, since Smith did not do discovery for over two years, first because of her reliance upon the Bank's admissions

and then because her Rule 56(f) request for additional discovery was not granted, some evidence was lost. "The more time that elapses the greater the risk that evidence will be lost." Id. 425.

The District Court did explain to Smith that if she could "demonstrate during the course of discovery that there has been some loss of evidence...because of the lapse of time" then she could seek additional relief. (infra, App. D 5). Pursuant to the District Court's directive, after the additional discovery period expired Smith moved to reinstate the Rule 36 admissions. This motion was erroneously denied. (infra, App. C).

In moving to reinstate the admissions, it was Smith's contention that crucial evidence was lost because of the delay in doing discovery since she had discovered

critical instances of memory loss. The District Court conceded that evidence was lost, but it determined that Smith had not proven any prejudice resulting from the lost evidence. (infra, App. C 7). However, in most of these instances Smith did not know exactly what evidence was lost because she hadn't discovered what evidence was originally available. Considering the basis of the District Court's decision to grant summary judgment, the evidence lost was crucial to Smith's case.

The District Court ultimately granted the Bank's motion for summary judgment because it found that (1) when the Bank issued the false credit report Smith appeared to it to be a customer, (2) the Bank did not act in bad faith in publishing the false credit report, and (3) the Bank could reasonably infer that Smith was liable on the

account at the time it reported her as being delinquent on the account. (infra, App. E 11-22).

A key question was why the Bank continued to issue the false credit report after the Sheriff's Investigator informed the Bank of the forgery. The Sheriff's Investigator did not know who he had relayed this information to at the Bank. Smith sought, by way of an interrogatory to the Bank, to determine who the Sheriff's Investigator talked with. The Bank responded that it had no records which indicate that it was contacted by the Sheriff's Department with regard to the forgery. It was crucial to Smith's case to determine who the Investigator talked with so she could take this person's deposition and determine why the Bank had continued to report the delinquency after the Investigator's

telephone call. It's impossible to know what favorable evidence Smith might have discovered had she been able to depose this person. It's very probable that had Smith inquired about this matter two years prior, in the original discovery period, she could have discovered who the Investigator spoke with.

Also, Smith needed to determine why the Bank took no action with regard to the VISA account when she had sent it a letter in August of 1984 explaining the forgery. Mr. Timothy Lohr was the Bank employee receiving this letter. Mr. Lohr testified that he probably would have done a computer search for the account and that there would not have been enough information in this letter to track down the account. Mr. Lohr reasoned that therefore, no action could have been taken on the account based upon the letter.

Mr. Lohr could not actually remember searching for the account at the time his deposition was taken and he could not remember what information he might have used in actually doing a computer search. Mr. Lohr did remember that he made no attempt to contact Smith to request additional information. A former Bank employee testified that the account could most probably have been located using only information that was provided in the letter. Answers to the questions of whether Mr. Lohr actually searched for the account and whether he actually found the account could have proved that the Bank had specific knowledge of the forgery when it published the credit report and that the Bank acted with bad faith in publishing the credit report. This information was lost with Mr. Lohr's memory loss.

Furthermore, in establishing bad faith Smith needed to examine each link in the Bank's decision making process when it finally decided to retract the false credit report some four months after Smith had given notice of the forgery. Former Bank employee Bob J. Finlay testified that he was the person who acted to retract this false credit report. Although Mr. Finlay testified that he did not become aware of Smith's forgery contention until the very day he acted to retract the false report, he could not recall who had explained to him that Smith contended that her name was forged to the VISA application. Smith needed to depose this unknown person to determine why Mr. Finlay wasn't told of Smith's forgery contention much earlier so the false credit report could be retracted. This information was not available to Smith at the time of the

additional discovery period.

Because Smith was forced to support her case with discovery which came over two years after she originally would have done discovery and over a year after she had requested additional discovery, crucial witnesses and evidence were lost. Since Smith did not do necessary discovery previously in reliance upon the admissions, it is now impossible to know all the evidence that was lost by her reliance upon the admissions. The prejudice contemplated by Rule 36(b) "relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions". Brook Village North Associates v. General Electric Company, 686 F.2d 66, 70 (1st Cir. 1982).

Furthermore, the mere fact that this case underwent an over two year delay because of withdrawal of the admissions was sufficient Rule 36(b) prejudice preventing withdrawal. The original discovery period in this case began in November of 1984. The discovery period made necessary because of the Bank's withdrawal of the admissions did not begin until January of 1987. Because of the Bank's failure to respond to the request for admissions and its subsequent belated attempts to withdraw the admissions, the proceedings of this case were at the same point in January of 1987 as they were in November of 1984. Because of withdrawal of the admissions, this case was delayed by over two years. Its ironic that, because Smith tried to expedite her case by making a comprehensive use of Rule 36, her case underwent such a tremendous delay.

The District Court erroneously determined that delay in a case caused by withdrawal of admissions could not constitute prejudice as contemplated by Rule 36(b). The District Court opinion which was affirmed by the Eleventh Circuit Court of Appeals, expressly rejected the argument that "the delay, in and of itself, constitutes undue prejudice." (infra, app. D 2). This ruling was made despite the rules of construction found in F.R.C.P. Rule 1, 28 U.S.C.A., which provide that the Federal Rules of Civil Procedure are to be construed to bring a "speedy" determination of every action. In reaching its decision the District Court disregarded the express purpose and the very intent of Rule 36. "Rule 36 serves two vital purposes, both of which are designed to reduce trial time." Rule 36 Notes of Advisory Committee on Rules, 1970 Amendment.

The District Court's interpretation of Rule 36(b), which was affirmed by the Eleventh Circuit, would subvert the very design of Rule 36 as it would allow Rule 36 to be used to actually delay litigation rather than to expedite it.

Another Court appears to have rejected the premise that no Rule 36(b) prejudice results even where withdrawal of admissions would cause a delay of the case. The Second Circuit Court of Appeals has recognized that there would be prejudice preventing the withdrawal of admissions if withdrawal would result in a delay of the case since the purpose of Rule 36 is to expedite the trial. Moosman v. Joseph P. Blitz, Inc., 358 F.2d 686, 688 (2nd Cir. 1966). Although Moosman pre-dates the birth of the Rule 36(b) test for withdrawal, it was specifically cited in the Notes of the Advisory Committee on Rules,

1970 Amendment to Rule 36 in regard to the statement that reliance upon admissions will not operate to a party's prejudice.

Because Smith relied upon the admissions she was forced to do discovery to prove her case over two years late when crucial evidence was lost and the entire case was delayed by over two years. If Rule 36(b) does not prohibit withdrawal of admissions under these circumstances, litigants are foolhardy if they use and rely upon Rule 36.

II.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE FAIR CREDIT REPORTING ACT APPLIES TO BUSINESS INSTITUTIONS WHO COMMERCIALLY PUBLISH FALSE CREDIT INFORMATION ABOUT THEIR OWN TRANSACTIONS OR EXPERIENCES WITH THEIR CUSTOMERS WHEN THEY KNOW THAT THE CREDIT INFORMATION BEING PUBLISHED IS FALSE.

To establish the Bank's liability under the Fair Credit Reporting Act, Smith admittedly had to establish that the Bank was acting as a "consumer reporting agency" and that it published a "consumer report", all as defined by the Act. The Act defines a consumer reporting agency as follows:

> The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a

> cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports. Title 15 U.S.C.A. §1681a(f).

In this case the Bank admitted that it regularly uses a means or facility of interstate commerce for the purpose of assembling credit information. The Bank further admitted that it regularly assembles and evaluates consumer credit information in

processing applications it receives for loans and that it provides this information to third parties.

Despite these admissions the Eleventh Circuit Court of Appeals ruled that the Bank was not acting as a "consumer reporting agency" in this case because it did not furnish a "consumer report" as defined by the Fair Credit Reporting Act. (infra, App. A 8). This ruling was based upon the exception to the definition of a "consumer report" found in 15 U.S.C.A. §1681 a(d)(A) which exempts "any report containing information solely as to transactions or experiences between the consumer and the person making the report."

This case presents the question of whether this exception applies to a credit report in which the entity making the report knew that it falsely reflected transactions

or experiences between it and the consumer. In this case the Bank sent the unsolicited application for the VISA card and, because of the forgery, issued a credit card in Smith's name without her knowledge or consent. Smith informed the Bank through two telephone conversations that there had been a forgery and that the credit card was not her's. At Smith's request, a Sheriff's Investigator informed the Bank that after an investigation, he had determined that Smith's name had been forged to the VISA application. Smith then also mailed a letter to the Bank reporting the forgery and requesting a retraction. The Bank never responded to or made inquiry of Smith with regard to this letter. Despite all of this notice, the Bank continued to commercially publish the report that Smith was delinquent on a VISA account.

The exception to the definition of a

consumer report found in §1681 a(d)(A), was not intended to apply to the situation in which the person making the report knew it did not accurately reflect transactions between it and the consumer. This is particularly true where, as in this case, the person making the report knew that it falsely reported there were transactions between it and the consumer when in fact there were no such transactions.

Congress has specifically stated its purpose in enacting the Fair Credit Reporting Act. See Title 15 U.S.C.A. §1681. In this regard the Ninth Circuit has noted, "[t]he purpose of the Fair Credit Reporting Act, 15 U.S.C.A. §1681 et seq., is to protect consumers from the transmission of inaccurate information about them." Kates v. Crocker National Bank, 776 F.2d 1396, 1397 (9th Cir. 1985).

Given the purposes of the Fair Credit Reporting Act, a major loophole would result if the limited exception of §1681a(d)(A) could apply to credit reports in which the person making the report knows it to be false. There should be an obligation, even for those reporting only their own transactions or experiences between consumers, not to willfully publish a credit report knowing it to be false.

In its guidelines at 4 CCH Consumer Credit Guide, Para. 11,305, the Federal Trade Commission has provided:

> [s]ome banks and finance companies have engaged in the practice of giving out credit information other than that which they have developed from their own ledgers. To the extent that they give out information and experience

gained from other creditors, such banks and finance companies would be functioning as consumer reporting agencies and would be required to comply with the terms of the Act.

In this case the Bank knew that the credit information it was publishing was not really in regard to a transaction with one of its customers. Apparently the Bank wanted to force Smith to pay the delinquent account without regard to whether she had any legal responsibility for the account. As the Federal Trade Commission recognized, banks act as "consumer reporting agencies" when they publish credit information not obtained from their own ledgers. Likewise, even if the information does come from the bank's own ledgers, if the bank knows it to be false and

still publishes it, the bank should be found to be acting as a "consumer reporting agency."

If the Bank was not governed by the Fair Credit Reporting Act when it willfully published false credit information about Smith, the Fair Credit Reporting Act would not fully meet its intended purpose of protecting consumers from having inaccurate and arbitrary credit information about them commercially published.

CONCLUSION

For these various reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

Selma Smith , Plaintiff-Appellant,

v.

FIRST NATIONAL BANK OF ATLANTA,
Defendant-Appellee.

No. 87-8506

Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

February 26, 1988

Appeal from the United States District Court
for the Northern District of Georgia.

Before Roney, Cheif Judge,KRAVITCH and
JOHNSON, Circuit Judges.

PER CURIAM:

After a remand by this Court for the district Court to consider under the proper

standards a motion by defendants for leave to file an out-of-time response to plaintiff's request for asmissions, defendant was permitted to file its response pursuant to Fed. R.Civ.P. 36(b). After the response was filed, the district court entered summary judgment for defendant. Plaintiff appeals. We affirm.

Plaintiff Selma Smith sued the First National Bank of Atlanta alleging a violation of the Fair Credit Reporting Act and of her right of privacy, and for libel. The Bank had reported that Smith was delinquent in her Visa account when an ex-husband had signed her name to the application for the account and, in fact, she had no account with the Bank.

The defendant Bank failed to respond, within the 45 days required by Rule 36, to a lengthy request for admissions. That failure,

by operation of law, admitted all matters alleged including liability for $50,000 in actual damages and 1.5 million dollars in punitive damages.

The district court, applying a local rule, permitted a response, reopened discovery, and entered summary judgment for the defendant Bank. On appeal, in an unpublished opinion, this Court held the district court had improperly applied the local rule inconsistently with Rule 36(b), which establishes a two-part test in considering the withdrawal of admissions: first, that the presentation of the merits will not be subserved by the withdrawal, and second, that the party obtaining the admissions would not be prejudiced in its presentation of the case by the withdrawal. Smith v. First National Bank, 797 F.2d 980 (11th Cir. 1986). The district court having

reinstated the Bank's response to admissions and having reissued the summary judgment, the purpose of this review is to determine whether it complied with the prior mandate of this Court and properly applied Rule 36(b), and whether summary judgment was proper.

[1] The district court, in granting defendant's motion to reopen discovery and to respond to the plaintiff's request for admissions, stated:

> The court concludes that the presentation of the merits of this action will be subserved by permitting the defendant to respond to the request for admissions. It would be manifestly unfair and grossly unjust to permit the plaintiff to obtain a judgment of the magnitude she is seeking due to the inadvertence of the defendant which is at most excusable neglect. The ascertainment of the truth and the development of the merits would be enhanced by permitting the defendant to respond, especially in view of the absence of some particularized allegations of the prejudice caused by the delay. In the absence of such a showing, plaintiff cannot establish the requisite prejudice that would justify the denial of

> defendant's motion. Therefore, the court concludes that the defendant is entitled, under both parts of the Rule 36(b) test, to relief.

Discovery was reopened for 60 days. Smith was also awarded $18,275 in partial compensation for expenses incurred up until remand. The court provided that plaintiff could seek relief from the withdrawal of admissions if she discovered in the course of the proceedings "that the delay has in any way affected her ability to obtain appropriate discovery." This was done by a motion to reinstate the admissions. The district court carefully considered, but rejected, every allegation of specific prejudice.

Thus, the district court properly applied the two-part test in Fed.R.Civ.P. 36(b). The district court noted that the defendant's failure to timely respond to Smith's request for admission was inadvertent

and "at most excusable neglect." There is nothing in the record that shows such finding was erroneous. Cf. Reyes v. Vantage S.S. Co., Inc., 672 F2d 556, 557-58 (5th Cir.1982) (district court's withdrawal of admission pursuant to Rule 36(b) affirmed where admission was based on "faulty assumption"); Asea, Inc. v. Southern Pac. Transp. Co., 669 F.2d 1242, 1248 (9th Cir. 1981)("In a proper case...such as when an admission has been made inadvertently, Rule 36(b) might well require the district court to permit withdrawal."].

Rule 36(b) "emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice." Fed.R.Civ.P. 36 advisory committee's note. Smith has not

satisfactorily shown on this appeal that the district court was wrong in deciding that withdrawal has prejudiced her in maintaining the action on the merits.

> The prejudice contemplated by the Rule is not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth. Rather, it relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions.

Brook Village North Assoc. v. General Elec. Co., 686 F.2d 66, 70 (1st Cir.1982).

[2,3] The district court properly granted the Bank's motion for summary judgment. First, where the Bank has reported information based solely on its own experience with one of its customers, the Bank is not acting as a "consumer reporting agency," within the meaning of the Fair

Credit Reporting Act, because, inter alia, it has not furnished a "consumer report" as that term is defined in the Act. A "consumer report" does not include "any report containing informarion solely as to transactions or experiences between the consumer and the person making the report." 15 U.S.C.A. Sec. 1681a(d), (f); Rush v. Macy's New York, Inc. 775 F.2d 1554 (11th Cir. 1985). Accord Freeman v. Southern Nat'l Bank, 531 F.Supp. 94 (S.D.Tx.1982). Here, the Bank did no more than furnish information regarding an account in the name of Selma Woody to a credit reporting agency. Plaintiff argues that the Bank's information was not as to a transaction between it and a consumer, because Smith was not, in fact, a customer of the Bank. The record supports, however, the district court's finding that from the Bank's point of view, until it received an affidavit

from Smith indicating there had been a forgery, which enabled it to take immediate action to correct the reports it sent, it believed Smith was its customer and responsible for the delinquent account. The district court properly applied the Act in deciding these facts did not make the Bank's information a consumer report.

The key to Smith's argument that the Bank has willfully intruded upon her seclusion or solitude or into her private affairs, so as to amount to an invasion of her right to privacy, is whether the Bank acted in bad faith in issuing the report. See Peacock v. Retail Credit Co. 302 F.Supp.418, 422-24 (N.D.Ga.1969), aff'd 429 F.2d 31 (5th Cir.1970), cert. denied, 401 U.S. 938, 91 S.Ct. 927,28 L.Ed.2d 217 (1971) (discussing applicability of tort of invasion of privacy where alleged false credit reports have been

issued) and Haggard v. Shaw, 100 Ga.App.813, 818, 112 S.E.2d 286, 291 (1959) (containing broad language to the effect that cause of action for invasion of privacy may be maintained where, information sent is done for the purpose of doing injury to the plaintiff). There is nothing in this record to contradict the district court's finding that bad faith was not present in the case.

[4] As to plaintiff's libel claim, the report issued was not libelous per se. Therefore, absent a showing of special damages, plaintiff cannot recover damages from the Bank. See Hood v. Dun & Bradstreet, Inc., 486 F.2d 25,27-8 (5th Cir.1973), cert. denied, 415 U.S. 985, 94 S.Ct. 1580, 39 L.Ed.2d 882 (1974). No showing of special damages was made. Smith admits that she has not been denied credit, and has in fact received credit since the reports were

issued.

Apparently the bank furnished erroneous information about plaintiff's indebtedness, after her contact with the bank, as a result of confusion because the VISA account was in the name of Selma Woody, whereas plaintiff was challenging the Bank's information under the name of Selma Smith. After receiving clear notification that the plaintiff had not signed the application, the Bank corrected its error.

AFFIRMED.

APPENDIX

MOTIONS FOR SUMMARY JUDGMENT

Both the plaintiff and defendant Bank have filed motions for summary judgment. The

plaintiff in her complaint has asserted claims based on alleged violations of the Act, 15 U.S.C. Sec. 1681, of her right to privacy, and of O.C.G.A. Sec. 51-5-1(a), Georgia's libel statue. The basis of the plaintiff's motion for summary judgment is defendant Bank's failure to timely file responses to her request for admissions. Because this court has granted defendant Bank's motion for leave to file its responses, the plaintiff's motion for summary judgment is without merit since defendant Bank is not deemed to have made the requested admissions. Accordingly, the court overrules and denies the plaintiff's motion for summary judgment.

1. Fair Credit Reporting Act Claim

Defendant Bank has moved for summary

judgment under Rule 56, Fed.R.Civ.P., as to each of the plaintiff's claims stating that there are no material facts in dispute. With respect to the plaintiff's first claim, defendant Bank contends that it is not a "consumer reporting agency" within the meaning of 15 U.S.C. Sec. 1681a(f), which provides as follows:

> The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

Section 1681a(d) defines the term "consumer report" in part as follows:

> The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's

> credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit.... The term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report....

Under certain circumstances, a bank could be a consumer reporting agency. See Freeman v. Southern National Bank, 531 F.Supp. 94, 95 (S.D.Tex.1982). When a bank, however, furnishes information based solely on its own experience with a consumer, it is not a consumer reporting agency because of the exclusion specified in Sec. 1681(d). The Act narrowly defines consumer reporting agencies by stating that they "assemble or evaluate" consumer credit information. See D'Angelo v. Wilmington Medical Center, Inc. 515 F.Supp.

1250, 1253 (D.Del.1981). This restriction in the definition "implies a function which involves more than receipt and retransmission of information indentifying a particular debt." Id. The Act is not "directed to those who supply information on individual debts to... consumer reporting aghencies, nor to those who are remote from those decisionmakers who rely upon 'consumer reports' in making credit and other decisions." Id.

In the present case, the plaintiff contends that summary judgment is improper as to her claim under the Act because she never applied for credit with defendant Bank and because she never transacted any business with defendant Bank. She asserts that defendant Bank may not deny liability by claiming the exclusion of Sec. 168la(d) as to transactions and experiences between the

consumer and the person making the report. While it is clear that the plaintiff was not a customer of defendant Bank, the alleged deception of her ex-husband caused her to appear as a customer to defendant Bank. Furthermore, the reporting of Selma Woody's debt on the joint account is similar to the transmission of "information indentifying a particular debt." Id. Under these circumstances the court finds that defendant Bank is not a consumer reporting agency within the meaning of Sec. 1681a(f). The court therefore sustains and grants defendant Bank's motion for summary judgment as to the plaintiff's claim under the Fair Credit Reporting Act.

2. Right of Privacy Claim

With respect to the plaintiff's claim

that defendant Bank violated her right of privacy, defendant Bank maintains that summary judgment is proper beacuse the plaintiff has not stated a cause of action against it. The plaintiff argues that defendant Bank has willfully intruded upon her seclusion or solitude, or into her private affairs.

Georgia case law recognizes that the right of privacy protects a person from intrusion upon his seclusion or solitude, or into his private affairs. See Hines v. Columbus Bank & Trust Co., 137 Ga.App. 268, 269, 223 S.E.2d (1976). When a plaintiff alleges intrusion in this manner, he must also state that the intrusion was "physical, analogous to a trespass." See Peacock v. Retail Credit Co., 302 F.Supp. 418, 422 (N.D.Ga.1969), aff'd 429 F.2d 31 (5th Cir.1970), cert. denied, 401 U.S. 938, 91

S.Ct. 927, 28 L.Ed.2d 217 (1971). Georgia law indicates, however, that a physical intrusion may not be necessary if the alleged intruder acted in bad faith. See Haggard v. Shaw, 100 Ga.App. 813, 112 S.E.2d 286 (1959) (letter written to plaintiff's employer seeking aid in recovering a debt is actionable as an invasion og privacy if the letter was written "deliberately and in bad faith for the purpose of doing personal injury to the plaintiff").

In the present case, the plaintiff has not provided any evidence indicating that there was a physical intrusion in the nature of a trespass, nor has the plaintiff produced any affidavits that suggest that defendant Bank acted in bad faith. Although this court recognizes that summary judgment is difficult when an issue involves an individual's state of mind, summary judgment is nonetheless

proper if the party opposing summary judgment fails to indicate "that he can produce the requisite quantum of evidence to enable him to reach the jury with his claim." Hahn v. Sargent, 523 F.2d 461, 468 (1st Cir.1975). Under the circumstances of this case, the court sustains and grants defendant Bank's motion for summary judgment as to the plaintiff's right of privacy claim.

3. Libel Claim

Defendant Bank moves for summary judgment as to the plaintiff's libel claim, contending that the report distributed conconcerning Selma Woody's delinquent VISA credit card does not constitute libel per se and that the plaintiff has suffered no special damages. Although the plaintiff has admitted that she has not suffered any

special damages, she maintains that defendant Bank has committed libel per se.

O.C.G.A. Sec. 51-5-1(a) defines libel, which is written defamation as follows: "A libel is a false and malicious defamation of another, expressed in print, writing, pictures, or signs, tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule." The definition of slander in Georgia has been incorporated into the definition of libel. See Hayes V. Irwin, 541 F.Supp. 397, 431 n. 34 (N.D.Ga.1982). aff'd 729 F.2d 1466 (11th Cir.1984). O.C.G.A. Sec. 51-5-4(a) defines slander, which is oral defamation as follows:

> (1) Imputing to another a crime punishable by law;
>
> (2) Charging a person with having some contagious disorder or with being guilty of some debasing act which may exclude him from society;
>
> (3) Making charges against another

in reference to his trade, office, or profession, calculated to injure him therein; or

(4) Uttering any disparaging words productive of special damage which flows naturally therefrom.

In the first three categories damages are inferred; in the last category, special damages are necessary to support an action. See Hood v. Dun & Bradstreet, Inc., 486 F.2d 25,28 n.3 (5th Cir.1973), cert. denied, 415 U.S. 985, 94 S.Ct. 1580, 39 L.Ed.2d 882 (1974); O.C.G.A. Sec. 5105-4(b).

In Hood, 486, F.2d at 27-28, the Fifth Circuit Court of Appeals considered a credit report prepared by a defendant, who was a credit reporting agency. The report inaccurately stated that the plaintiff was being sued for a debt and that the plaintiff's working capital was limited. The Court of Appeals agreed with the district

court that the report was not libelous per se because the statements, although false, did not "impute to another conduct, characteristics or a condition incompatible with proper exercise of lawful business or trade." Id. at 28.

In the present case, the plaintiff argues that defendant Bank committed libel per se as defined by the Georgia Supreme Court in Conway v. Signal Oil & Gas Co., 229 Ga. 849, 851, 194 S.E.2d 909 (1972). In Conway, 229 Ga. 850-51, 194 S.E.2d 909, the defendant had issued the plaintiff's husband a credit card. Even though the plaintiff had never used the card, the defendant had attempted to collect the debt by calling the plaintiff's employer. The Georgia Supreme Court held that because under Georgia law a wife is not liable for any credit extended unless she has accepted goods with the

knowledge that she may be held liable, the defendant could not "reasonably infer that the plaintiff had assumed the account...." Id. at 851, 194 S.E.2d 909. The Court thus held that the letter to the employer was libelous per se.

Under the circumstances of the present case, it appears that defendant Bank could reasonably infer that Selma Woody was liable for defendant Woody's debts since the application for a joint account was allegedly signed by her. The particular facts of this case are not similar to cases where malice can be inferred from the nature of the defamation. See generally Rosanova V. Playboy Enterprises, Inc., 411 F.Supp. 440, 445 (S.D.Ga.1976), aff'd 580 F.2d 859 (5th Cir.1978). After receiving clear notification that the plaintiff had not signed the application, defendant Bank corrected its

error. As a result of the error, the plaintiff was not denied credit anywhere. Because the plaintiff has admitted that she has incurred no special damages and because the court finds that the inaccurate report does not constitute libel per se, the court sustains and grants defendant Bank's motion for summary judgment as to the plaintiff's libel claim.

In summary, the court overrules and denies the plaintiff's motion to strike defendant Bank's answer and for entry of a default judgment, overrules and denies defendant Bank's motion for attorney's fees, overrules and denies the plaintiff's motion for summary judgment, sustains and grants defendant Bank's motion for leave to file responses to the plaintiff's requests for admissions, and sustains and grants defendant Bank's motion for summary judgment. The Clerk

of Court is directed to enter judgment in favor of defendant Bank.

SO ORDERED, this 19 day of August, 1985.

/s/G. ERNEST TIDWELL
JUDGE, UNITED STATES DISTRICT COURT

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-8785

SELMA SMITH,

Plaintiff-Appellant,

verses

FIRST NATIONAL BANK OF ATLANTA
and ROBERT WOODY,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(July 24, 1986)

Before KRAVITCH and HATCHETT, Circuit Judges,
and DUMBAULD*, Senior District Judge.

Per Curiam:

*Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

In this case, we examine the relationship between Rule 36(b), Federal Rules of Civil Procedure and a local rule of the Northern District of Georgia regarding withdrawal of admissions. Finding that the district court interpreted the local rule in a manner rendering it inconsistent with rule 36(b), we reverse.

The First National Bank of Atlanta (First Atlanta) mailed an unsolicited application for a VISA card to the appellant, Selma Smith's, old address under Smith's prior name of Selma Woody. Someone signed Smith's name on the application, and the bank sent VISA cards to the address where Smith formerly resided with her ex-husband.

When the VISA account became delinquent,

the bank contacted Smith by telephone. Smith informed the bank that she had no knowledge of the application or of the account. The bank reported to the LaGrange Credit Bureau that Smith had a delinquent account. After Smith sent several letters, the bank retracted the false credit report.

Smith filed this lawsuit against the bank and her ex-husband alleging three grounds for recovery. She first contended that the bank was "a consumer reporting agency" and as such an agency, had violated the Fair Credit Reporting Act. Her second ground for recovery was that under Georgia law, the bank had violated her right to privacy. Her third claim was that the bank had libeled her.

Along with her Complaint, Smith filed a Request for Admission of Matters in a Request for Production of Documents. First Atlanta

filed an answer denying all liability, but nearly seven months later, it had not responded to the requests for admissions with the complaint. Smith then filed a motion for default and a summary judgment. Smith's motion for summary judgment was based upon the "admissions" the bank implicitly made by failing to respond to the request for admissions. Smith's motion to strike the bank's answer and enter default judgment was based upon Federal Rule of Civil Procedure 37(d). The bank filed a Motion for Leave to File Responses to Plaintiff's Request for Admission of Matters and its own motion for summary judgment.

The district court denied Smith's motion for summary judgment and motion for default judgment; it granted First Atlanta's motion for leave to respond to Smith's request for admissions and the bank's motion for summary judgment.

DISCUSSION

Federal Rule of Civil Procedure 36(a) provides that if a request for admissions is not answered within forty-five days, the

request is deemed admitted.* Thus, because First Atlanta did

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*Rule 36(a), in pertinent part, provides:

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him.

Rule 36(b), in pertinent part, provides:

Effect of Admissions. Any matter admitted under this rule is conclusively established unless the court on motion oermits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 govering amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that wiothdrawal of amendment will prejudice him in maintaining his action or defense on the merits.

not timely answer Smith's request, it implicitly admitted the request. The requested admissions included various broad statements constituting the elements of Smith's grounds of recovery and a request that the bank's actions resulted in $50,000 actual damages and $1,500,000 punitive damages.

Federal Rule of Civil Procedure 36(b) establishes a two-part test which permits a court to allow withdrawal of admissions. The court must find that (1) the presentation of the merits of the action will not be subserved by a withdrawal of the admissions, and (2) that the party obtaining the admissions would not be prejudiced by the withdrawal. Smith contended that she would suffer irreparable prejudice if the court granted First Atlanta's motion for leave to

file its responses, because she relied on the requested admissions and did not pursue discovery. Therefore, Smith claimed to be unable to prepare for trial or to contest First Atlanta's motion for summary judgment.

The district court, in granting First Atlanta's motion for leave to respond to Smith's request for admissions, held that "any prejudice that the plaintiff may incur could easily have been prevented by complying with the Local Rules concerning discovery." The court found that Smith violated Local Rule 225-4(a), N.D. Ga., which provided that "[c]ounsel shall have the duty to make a good faith effort to resolve by agreement among themselves any disputes which arise in the course of discovery." The court also cited Local Rule 225-4(b), N.D. Ga., which provides that before a lawyer may file a motion to

compel, the lawyer must file a statement certifying that contact has been made with opposing counsel in an attempt to resolve the controversy.

Although great deference is accorded to a district court's interpretation and application of its rules of practice and procedure, where the appellate court is convinced that the district court has misconstrued its own rules, reversal may be warranted. Smith v. Ford Motor Co., 626 F. 2d 784, 796 (10th Cir.1980), cert. denied, 67 L.Ed.2d 344 (1981). We find that the district court erred in applying Local Rule 225-4(a), N.D. Ga., in this case. No dispute existed regarding Smith's admissions request until the bank sought to file responses some seven months after the admissions request had been served. We reject First Atlanta's assertion that a "dispute" involves any matter

involving discovery. By its terms, the rule applies only when motions to compel are contemplated. Smith was not required to make a motion to compel in response to its request for admissions because First Atlanta admitted such claims by its failure to timely respond. See United States ex rel. Seals v. Wiman, 304 F. 2d 53, 62 (5th Cir. 1962), cert. denied, 9 L.Ed.2d 729 (1963). Furthermore, according to the district court's order, it makes no difference whether withdrawal of admissions will prejudice the party seeking the admission, if that party's counsel could have earlier avoided the potential for prejudice.

The purpose of rule 36(a) is to expedite litigation by providing an inexpensive and efficient means of establishing uncontested issues. Federal Rule of Civil Procedure 83 gives each district court the authority to "make and amend rules governing its practice

not inconsistent with [the Federal Rules of Civil Procedure]." The district court's interpretation of the local rules is clearly in conflict with the Federal Rules of Civil Procedure. Although normally a district court's interpretation of its own rules is accepted, courts cannot do so where an interpretation renders a facially innocuous rule inconsistent with the federal rules. John v. State of Louisiana Board of Trustees for State Colleges and Universities, 757 F. 2d 698, 707 (5th Cir. 1985). Thus, the district court's finding that if Smith suffered prejudice, she was at fault for not avoiding such prejudice improperly applied rule 36(b)'s two-part test for withdrawal of admissions.

Because we find that the district court abused its discretion in granting First Atlanta's motion for leave to respond to

Smith's request for admissions, we do not reach the other issues presented on appeal. Accordingly, we remand this case to the district court with directions to apply the two-part test set forth in Federal Rule of Civil Procedure 36(b) in cinsidering First Atlanta's motion for leave to respond to Smith's request for admissions.

REVERSED AND REMANDED

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SELMA SMITH	)
	)
v.	)CIVIL ACTION
	)NO. C86-2027A
THE FIRST NATIONAL BANK OF ATLANTA and ROBERT WOODY	)

ORDER

The above-styled matter is presently before the court on two motions: (1) plaintiff's motion to reinstate Rule 36 admissions and (2) defendant First National Bank of Atlanta's (FNBA") motion for summary judgment.

PLAINTIFF'S MOTION TO REINSTATE RULE 36 ADMISSIONS

Plaintiff moves to reinstate admissions made by defendant pursuant to Fed. R. Civ. P. 36. By its Order of October 22, 1986, the court allowed defendant to respond out-of-time to plaintiff's Requests for Admissions. Defendant's failure to initially so respond caused, by operation of law, all matters (including liability for $1.5 million dollars in compensatory and punitive damages) to be admitted. Fed. R. Civ. P. 36(a). In that Order, the court held that plaintiff could petition the court for further relief if plaintiff found during the course of discovery that it had been prejudiced by defendant's failure to respond to the Requests for Admissions when initially

propounded. Plaintiff now seeks such relief.

Plaintiff indentifies four instances of prejudice it has suffered because of defendant's delay in responding. In all of these instances, plaintiff contends that information material to her case has been irrevocably lost due to the delay. The court will discuss each of plaintiff's allegations seriatim.

A. Findlay Testimony

Plaintiff alleges that Findlay, a former employee of FNBA who drafted a retraction of the allegedly false credit information relayed to a credit reporting agency, cannot now remember the name of the person who informed him that plaintiff claimed her name was forged on a VISA application. Plaintiff claims that this information is material to her common law counts of invasion of privacy and libel;.

After reviewing his earlier affidavit, Findlay has stated under oath that he recalled that Terry Stair, another employee of FNBA, had been informed by plaintiff in June of 1984 that she had not signed a VISA application. (Dep. Findlay 6). Further, defendant has admitted in response to plaintiff's Request for Admission 1 that plaintiff informed the bank in June 1984 that she had not signed an application. Therefore, the date defendant was notified of the claim (June, 1984) and the identity of the party making the claim (the plaintiff) is established. While it is true that plaintiff has not yet discovered who told Findlay about plaintiff's claim, plaintiff does not identify the prejudice resulting from this lack of information, except for a general assertion that such evidence relates to malice on the part of the bank.

B. Stair Testimony

Plaintiff contends that Stair's inability to remember the precise time that plaintiff told him that her name had been forged to the credit application is material to her case.

Stair has stated by deposition that plaintiff so notified him in June of 1984 but could not pinpoint the exact date. (Dep. Stair 4). Again, plaintiff does not establish the exact prejudice resulting from an inability to fix an exact date for plaintiff's communication to defendant. Defendant has admitted that such a communication transpired in June of 1984.

C. Lohr Testimony

Lohr, an employee of FNBA, testified that he received a letter from plaintiff concerning the alleged forgery and was "pretty sure" that he then did a computer

check of the account. (Dep. Lohr 3-5). Plaintiff claims that Lohr's inability to be absolutely certain that such a check was made materially prejudices her case. Plaintiff does not proffer, nor can the court deduce, how this materially affects the case from plaintiff's standpoint. Lohr has admitted, with a slight degree of uncertainty, the point sought to be conceded by plaintiff.

D. Newsome Testimony

Plaintiff has obtained an affidavit from Officer Mike Newsome of the Troup County Sheriff's Department stating that Newsome called at defendant Bank sometime in July of 1984 and informed them that plaintiff's name had been forged on the VISA application. (Aff. Newsome 2). Plaintiff claims that Newsome's inability to remember exactly when and who he called is material to this action. Further, plaintiff avers that defendant's

answer to Interrogatory 18 of plaintiff's First Interrogatories, stating that defendant has no record of such a call, demonstrates a need to reinstate the admissions.

Plaintiff obviously has access to further testimony from Newsome. Plaintiff has made no allegation that Newsome is now avbailable for deposition or live testimony. Again, plaintiff fails to establish any tangible prejudice worked by defendant's denial.

Accordingly, plaintiff's motion to reinstate Rule 36 admissions is denied.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant moves for summary judgment as to all plaintiff's claims. Plaintiff presses three theories for redress: a statutory action under the Fair Credit Reporting Act. 15 U.S.C. Secs. 1681 et seq., invasion of right to privacy and libel.

The factual background of this matter has not changed in any material respect since the court's prior order on defendants' motion for summary judgment, issued on August 23, 1985. The court expressly adopts by reference those portions of the August 23, 1985 Order pertaining to and granting defendant's motion for summary judgment and, therefore, defendant's motion for summary judgment is granted.

The Clerk is hereby directed to enter judgment on behalf of defendant in this matter.

SO ORDERED, this 17 day of June, 1987.

/s/
G. ERNEST TIDWELL
JUDGE, UNITED STATES
DISTRICT COURT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SELMA SMITH	)	
	)	
v.	)	
	)	CIVIL ACTION
FIRST NATIONAL BANK OF ATLANTA	)	FILE NO.;
	)	

ORDER

The above-styled matter is presently before the court on the defendant's motion to reopen discovery and to respond to the plaintiff's request for admissions. Plaintiff opposes this motion, contending that she has been prejudiced by the delay occasioned as a result of the defendant's attempt to respond to plaintiff's request in an untimely fashion. The court previously ruled that such a withdrawal was permissible however the Eleventh Circuit has now reversed that

determination.

Plaintiff contends that the delay, in and of itself, constitutes undue prejudice and inhibits plaintiff's ability to present her case. The gravamen of this position is that plaintiff will be per se unable to garner the discovery necessary for the prosecution of her action due to the delay involved. Plaintiff has not indicated what particular areas of discovery are so prejudiced.

Rule 36(b) of the Federal Rules of Civil Procedure sets forth a two-part test for use in determining when withdrawal or amendment of request for admissions would be appropriate.

The court concludes that the presentation of the merits of this action will be subserved by permitting the defendant to respond to the request for admissions. It

would be manifestly unfair and grossly unjust to permit the plaintiff to obtain a judgment of the magnitude she is seeking due to the inadvertence of the defendant which is at most excusable neglect. The ascertainment of the truth and the development of the merits would be enhanced by permitting the defendant to respond, especially in view of the absence of some particularized allegations of the prejudice caused by the delay. In the absence of such a showing, plaintiff cannot establish the requisite prejudice that would justify the denial of defendant's motion. Therefore, the court concludes that the defendant is entitled, under both parts of the Rule 36(b) test, to relief. However, the court in order to obviate any possible unfairness to the plaintiff has concluded that relief shall be conditioned upon reimbursing the plaintiff for the expense she has incurred in

connection with the appeal of this matter, responding to the defendant's motion to withdraw admissions, and responding to the defendant's motion for summary judgment. Such a reimbursement would more than compensate the plaintiff for any inconvenience she may have incurred.

Accordingly, defendant's motion for leave of court to respond to the request for admissions is granted subject to the following conditions:

(1) That Plaintiff file an affidavit of the costs enumerated above within ten (10) days of the issuance of this order;

(2) That defendant shall pay such costs to the plaintiff within ten (10) days of the receipt of plaintiff's affidavit, or by appropriate motion contest the reasonableness of such costs by appropriate motion within ten (10) days of the receipt of said affidavit;

(3) That should the plaintiff discover during the course of the proceedings in this matter, that the delay has in any way affected her ability to obtain appropriate discovery, the plaintiff shall have the right to bring such facts to the attention of the court and to seek appropriate additional relief; and

(4) That both plaintiff and the defendant desire to conduct further discovery based upon the preceding rulings, therefore

the period for discovery is reopened and extended for a period of sixty (60) days from the date of defendant's payment of the costs set forth above.

SO ORDERED, this 22nd day of October, 1986.

/s/
G. ERNEST TIDWELL
JUDGE, UNITED STATES DISTRICT COURT

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

SELMA SMITH

V.

CIVIL ACTION
NO.: C85-61N

THE FIRST NATIONAL BANK
OF ATLANTA and
ROBERT WOODY

ORDER

The above-styled action is before the court on five motions: the plaintiff's motion to strike the answer of defendant First National Bank of Atlanta ("defendant Bank") and to enter a default judgment, defendant Bank's motion for leave to file responses to the plaintiff's request for admissions, defendant Bank's motion for attorney's fees, and the motion for summary judgment by the plaintiff and defendant Bank.

In February 1983 defendant Bank allegedly requested the plaintiff to apply for a VISA credit card. Defendant Bank addressed the invitation to "Selma Woody," the name the plaintiff used prior to her divorce from defendant Robert Woody ("defendant Woody"). In March 1983, defendant Bank received notice that Selma Woody and defendant Woody had signed a joint application for a VISA credit card. After the joint account became overdue, defendant Bank contacted the plaintiff in June 1984 to discuss payment of the delinquent joint account; the plaintiff told defendant Bank that she did not own a VISA credit card. In August the plaintiff and her attorney sent two letters to defendant Bank to notify them that her signature on the VISA credit card was forged by defendant Woody, her ex-husband. After receiving in September 1984

an affidavit from the plaintiff that stated that she had never signed an application for a VISA credit card, defendant Bank sent a letter to Credit Bureau Inc. and Associates ("CBI) stating that Selma Woody was not to be held accountable for any debts incurred on the joint account. This credit reporting agency and other similar agencies had received the information about Selma Woody's VISA account on magnetic tapes prepared by defendant Bank regarding transactions and experiences with its customers.

The plaintiff originally brought this actionh in Superior Court of Troup County, Georgia, alleging that defendant Bank as a consumer reporting agency had violated the Fair Credit Reporting Act ("the Act"), 15 U.S.C. Sec. 1681, had violated her right to privacy, and had committed libel. Defendant Bank subsequently removed the action to a

district court; defendant Woody did not join the petition to remove.

The court will discuss first defendant Bank's failure to timely respond to the plaintiff's requests for admissions and for production of documents; the failure to respond is relevant to the motions for entry of a default judgment, for leave to file resposes, and for attorney's fees. Following the disposition of these motions, the court will address the motions for summary judgment.

DEFENDANT BANK'S FAILUYRE TO TIMELY RESPOND

On April 16, 1985, the plaintiff received a call from a deputy clerk, informing her that if a pretrial order was not submitted within ten days, the action could be dismissed. The plaintiff then called defendant Bank to ask if it would consent to

an extension of time to facilitate the completion of the pretrial order. Defendant Bank, with the court's consent, agreed to a sixty-day extension, which changed the original day for termination of discovery from March 8, 1985. The plaintiff on April 30, 1985, filed a motion to strike the answer of defendant Bank and for entry of a default judgment on the ground that defendant Bank had not produced the documents it had requested. After the plaintiff filed the motion to strike, defendant Bank became aware of the request to produce documents as well as the plaintiff's request for admissions, which the plaintiff discussed in her brief supporting the motion to strike. In less than two weeks defendant Bank answered the plaintiff's requests for admissions and stated that it would be willing to produce all non-privileged documents requested.

Defendant Bank maintains that it was unaware of the requests for admissions and for production of documents, which were served on defendant Bank along with the summons and complaint on October 10, 1984. Defendant Bank, which was represented by a new attorney in November 1984, argues that the plaintiff's earlier motion to remand resulted in numerous briefs filed by both parties. Defendant Bank emphasizes that the plaintiff never reminded it that the requests were pending and that the plaintiff never filed a motion to compel the defendant to respond.

Rule 37(d), Fed. R. Civ. P., provides that if a party fails to respond to a discovery request, the court "may make such orders in regard to the failure as are just ...." "Rule 37 sanctions are imposed not only to prevent unfair prejudice to the litigants but also to insure the integrity of

the discovery process." Aztec Steel Co. v. Florida Steel Corp., 691 F. 2d 480, 484 (11th Cir. 1982). Local Rule 225-4(a), N.D. Ga., provides that "[c]ounsel shall have the duty to make a good faith effort to resolve by agreement among themselves any disputes which arise in the course of discovery." In addition, before an attorney can file a motion to compel, he must file a statement certifying that he and opposing counsel attempted to resolve the controversy but were unable to do so. See Local Rule 225-4(b), N.D. Ga.

In the present case, defendant Bank failed to timely produce the requested documents and to timely respond to the plaintiff's written requests for admissions, but once aware of the requests, defendant Bank responded promptly. The plaintiff contends that she would suffer irreparable

prejudice if this court grants defendant Bank's motion for leave to file its responses. Because the plaintiff believed that defendant Bank was deemed to have made the requested admissions and because she believed that the failure to timely produce documents supported her motion to strike defendant Bank's answer, the plaintiff instructed her attorney not to pursue any further discovery. She now contends that if this court allows defendant Bank to file its responses she cannot properly respond to defendant Bank's motion for summary judgment or prepare for trial.

In examining the circumstances of this case, the court finds that any prejudice that the plaintiff may incur could easily have been prevented by complying with the Local Rules concerning discovery. It appears that defendant Bank would have responded to the

plaintiff's requests if the plaintiff had attempted to fulfill the requirements of bringing a motion to compel--a good faith attempt to resolve the controversy with opposing counsel. Under these circumstances the court overrules and denies the plaintiff's motion to strike defendant Bank's answer and for entry of a default judgment and sustains and grants defendant Bank's motion for leave to file its responses to the plaintiff's requests.

Defendant Bank has requested this court to award attorney's fees for the costs of responding to the plaintiff's motion to strike and for entry of a default judgment. Although the court has denied the plaintiff's motion, it was nonetheless defendant Bank's oversight that caused the delay in the first place. Under these circumstances, the court overrules and denies defendant Bank's motion

for attorney's fees.

MOTIONS FOR SUMMARY JUDGMENT

Both the plaintiff and defendant Bank have filed motions for summary judgment. The plaintiff in her complaint has asserted claims based on alleged violations of the Act, 15 U.S.C. Sec. 1681, of her right to privacy, and of O.C.G.A. Sec. 51-5-1(a), Georgia's libel statute. The basis of the plaintiff's motion for summary judgment is defendant Bank's failure to timely file responses to her request for admissions. Because this court has granted defendant Bank's motion for leave to file its responses, the plaintiff's motion for summary judgment is without merit since defendant Bank is not deemed to have made the requested admissions. Accordingly, the court overrules

and denies the plaintiff's motion for summary judgment.

1. Fair Credit Reporting Act Claim

Defendant Bank has moved for summary judgment under Rule 56, Fed. R. Civ. P., as to each of the plaintiff's claims, stating that there are no material facts in dispute. With respect to the plaintiff's first claim, defendant Bank contends that it is not a "consumer reporting agency" within the meaning of 15 U.S.C. Sec. 1681a(f), which provides as follows:

> The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

Section 168la(d) defines the term "consumer report" in part as follows:

> The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit.... The term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report....

Under certain circumstances, a bank could be a consumer reporting agency. See Freeman v. Southern National Bank, 531 F. Supp. 94, 95 (S.D. Tex. 1982). When a bank, however, furnishes information based solely on its own experience with a consumer, it is not a consumer reporting agency because of the

exclusion specified in Sec. 1681a(d). The Act narrowly defines consumer reporting agencies by stating that they "assemble or evaluate" consumer credit information. See D'Angelo v. Wilmington Medical Center, Inc., 515 F. Supp. 1250, 1253 (D. Del. 1981). This restriction in the definition "implies a function which involves more than receipt and retransmission of information identifying a particular debt." Id. The Act is not "directed to those who supply information on individual debts to... consumer reporting agencies, nor to those who are remote from those decisionmakers who rely upon 'consumer reports' in making credit and decisions." Id.

In the present case, the plaintiff contends that summary judgment is improper as to her claim under the Act because she never applied for credit with defendant Bank and

because she never transacted any business with defendant Bank. She asserts that defendant Bank may not deny liability by claiming the exclusion of Sec. 1681a(d) as to transactions and experiences between the consumer and the person making the report. While it is clear that the plaintiff was not a customer of defendant Bank, the alleged deception of her ex-husband caused her to appear as a customer to defendant Bank. Furthermore, the reporting of Selma Woody's debt on the joint account is similar to the transmission of "information indentifying a particular debt." Id. Under these circumstances the court finds that defendant Bank is not a consumer reporting agency within the meaning of Sec. 1681a(f). The court therefore sustains and grants defendant Bank's motion for a summary judgment as to the plaintiff's claim under the Fair Credit

Reporting Act.

2. Right of Privacy Claim

With respect to the plaintiff's claim that defendant Bank violated her right of privacy, defendant Bank maintains that summary judgment is proper because the plaintiff has not stated a cause of action against it. The Plaintiff argues that defendant Bank has willfully intruded upon her seclusion or solitude, or into her private affairs.

Georgia case law recognizes that the right of privacy protects a person from intrusion upon his seclusion or solitude, or into his private affairs. See Hines v. Columbus Bank & Trust Co., 137 Ga. App. 268, 269 (1976). When a plaintiff alleges intrusion in this manner, he must also state

that the intrusion was "physical, analogous to a trespass." See Peacock v. Retail Credit Co., 302 F. Supp. 418, 422 (N.D. Ga. 1969), aff'd, 429 F. 2d 31 (5th Cir. 1970), cert. denied, 401 U.S. 938 (1971). Georgia law indicates, however, that a physical intrusion may not be necessary if the alleged intruder acted in bad faith. See Haggard v. Shaw, 100 Ga. App. 813, 818 (1959) (letter written to plaintiff's employer seeking aid in recovering a debt is actionable as an invasion of privacy if the letter was written "deliberately and in bad faith for the purpose of doing personal injury to the plaintiff").

In the present case, the plaintiff has not provided any evidence indicating that there was a physical intrusion in the nature of a trespass, nor has the plaintiff produced any affidavits that suggest that defendant

Bank acted in bad faith. Although this court recognizes that summary judgment is difficult when an issue involves an individual's state of mind, summary judgment is nonetheless proper if the party opposing summary judgment fails to indicate "that he can produce the requisite quantum of evidence to enable him to reach the jury with his claim." Hahn v. Sargent, 523 F. 2d 461 (1st Cir. 1975). Under the circumstances of this case, the court sustains and grants defendant Bank's motion for summary judgment as to the plaintiff's right of privacy claim.

3. Libel Claim

Defendant Bank moves for summary judgment as to the plaintiff's libel claim, contending that the report distributed concerning Selma Woody's delinquent VISA

credit card does not constitute libel per se and that the plaintiff has suffered no special damages. Although the plaintiff has admitted that she has not suffered any special damages, she maintains that defendant Bank has committed libel per se.

O.C.G.A. Sec. 51-5-1(a) defines libel, which is written defamation as follows: "A libel is a false and malicious defamation of another, expressed in print, writing, pictures, or signs, tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule." The definition of slander in Georgia has been incorporated into the definition of libel. See Hayes v. Irwin, 541 F. Supp. 397, 431 n. 34 (N.D. Ga. 1982), aff'd, 729 F. 2d 1466 (11th Cir. 1984). O.C.G.A. Sec. 51-5-4(a) defines slander, which is oral defamation as follows:

(1) Imputing to another a crime punishable by law;

(2) Charging a person with having some contagious disorder or with being guilty of some debasing act which may exclude him from society;

(3) Making charges against another in reference to his trade, office, or profession, calculated to injure him therein; or

(4) Uttering any disparaging words productive of special damage which flows naturally therefrom.

In the first three categories damages are inferred; in the last category, special damages are necessary to support an action. See Hood v. Dun & Bradstreet, Inc.,486 F. 2d 25,28 n.3 (5th Cir. 1973), cert. denied, 415 U.S. 985 (1974); O.C.G.A. Sec. 51-5-4(b).

In Hood, 486 F. 2d at 27-28, the Fifth Circuit Court of Appeals considered a credit report prepared by a defendant, who was a credit reporting agency. The report inaccurately stated that the plaintiff was being sued for a debt and that the

plaintiff's working capital was limited. The Court of Appeals agreed with the district court that the report was not libelous per se because the statements, although false, did not "impute to another conduct, characteristics or a condition incompatible with proper exercise of lawful business or trade." Id. at 28.

In the present case, the plaintiff argues that defendant Bank committed libel per se as defined by the Georgia Supreme Court in Conway V. Signal Oil & Gas Co., 229 Ga. 849, 851 (1972). In Conway 229 Ga. 850-51, the defendant had issued the plaintiff's husband a credit card. Even though the plaintiff had never used the card, the defendant had attempted to collect the debt by calling the plaintiff's employer. The Georgia Supreme Court held that because under Georgia law a wife is not liable for any

credit extended unless she has accepted goods with the knowledge that she may be held liable, the defendant could not "reasonably infer that the plaintiff had assumed the account...." Id. at 851. The Court thus held that the letter to the employer was libelous per se.

Under the circumstances of the present case, it appears that defendant Bank could reasonably infer that Selma Woody was liable for defendant Woody's debts since the application for a joint account was allegedly signed by her. The particular facts of this case are not similar to cases where malice can be inferred from the nature of the defamation. See generally Rosanova v. Playboy Enterprise, Inc., 411 F. Supp. 440,445 (S.D. Ga. 1976), aff'd, 580 F. 2d 859 (5th Cir. 1978). After receiving clear notification that the plaintiff had not signed the

application, defendant Bank corrected its error. As a result of the error, the plaintiff was not denied credit anywhere. Because the plaintiff has admiotted that she has incurred no special damages and because the court finds that the inaccurate report does not constitute libel per se, the court sustains and grants defendant Bank's motion for summary judgment as to the plaintiff's libel claim.

In summary, the court overrules and denies the plaintiff's motion to strike defendant Bank's answer and for entry of a default judgment, overrules and denies defendant Bank's motion for attorney's fees. Overrules and denies the plaintiff's motion for summary judgment, sustains and grants defendant Bank's motion for leave to file responses to the plaintiff's requests for admissions, and sustains and grants defendant

Bank's motion for summary judgment. The Clerk of Court is directed to enter judgment in favor of defendant Bank.

SO ORDERED, this 19th of August, 1985.

/s/
G. ERNEST TIDWELL
JUDGE, UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
JUN 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1930

IN THE

Supreme Court of the United States

October Term, 1987

SELMA SMITH,
Plaintiff-Petitioner,
v.
THE FIRST NATIONAL BANK OF ATLANTA,
Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1.

Whether the Eleventh Circuit properly affirmed the District Court's exercise of discretion in allowing defendant to file responses to plaintiff's requests for admission, where the requests were served with the complaint, where defendant's new staff attorney inadvertently failed to respond timely to the requests, and where leave to respond was granted only upon condition that plaintiff be allowed two months of additional discovery and be paid $18,275.00 in costs and attorney's fees?

2.

Whether defendant, a national banking association, is a "consumer reporting agency" subject to the Fair Credit Reporting Act where the information it provides relates solely to transactions and experiences with its own customers?

LIST OF PARTIES

The parties to the proceedings below were Petitioner Selma Smith (plaintiff-appellant), and Respondent The First National Bank of Atlanta (defendant-appellee). Plaintiff's ex-husband, Robert Woody, was dismissed with prejudice as a defendant below prior to the District Court's final judgment.

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No. 87-1930

IN THE

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SELMA SMITH,
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Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent The First National Bank of Atlanta (the "bank") respectfully requests this Court to deny the petition for a writ of certiorari that seeks review of the Eleventh Circuit's affirmance of the District Court's grant of summary judgment to the bank.

JURISDICTIONAL STATEMENT

The opinion of the Court of Appeals for the Eleventh Circuit was entered on February 26, 1988. Petitioner seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Plaintiff filed this case against the bank and her ex-husband after he forged her name to a Visa application, allowed the account to become delinquent, and the bank reported the delinquency to a local credit bureau. Six days after the forgery was confirmed by the bank, the information concerning plaintiff was deleted from the credit bureau's files. It is undisputed that plaintiff was never denied credit as a result of the report, obtained credit in the interim, and suffered no actual damages.

Plaintiff seeks review of the Eleventh Circuit's affirmance of the District Court's exercise of discretion in granting leave to the bank to file responses to plaintiff's requests for admission, to which the bank had inadvertently failed to respond timely. Plaintiff also seeks review of the Eleventh Circuit's affirmance of the summary judgment granted to the bank on the ground that the bank is not a "consumer reporting agency" subject to the Fair Credit Reporting Act.

On October 3, 1984, plaintiff filed suit in the Superior Court of Troup County, Georgia, and served requests for admission with her complaint. On November 8, 1984, the bank removed the case to the United States District Court for the Northern District of Georgia, Atlanta Division, and filed an answer denying the allegations of the complaint.

On April 30, 1985, plaintiff moved for summary judgment based upon "admissions" the bank technically had made by inadvertently failing to respond to plaintiff's requests for admission. Less than two weeks later, the bank moved for leave to file responses to plaintiff's requests for admission. On May 27, 1985, the bank filed its own motion for summary judgment with supporting affidavits and a brief.

In an order dated August 19, 1985, the District Court granted the bank's motion for leave to file responses to plaintiff's requests for admission and granted the bank's motion for summary judgment. Petitioner's Appendix E.

With respect to plaintiff's claim under the Fair Credit Reporting Act, the District Court ruled that the bank was not a "consumer reporting agency" within the meaning of 15 U.S.C. § 1681a. *Id.* at 11-15. The District Court also entered summary judgment against plaintiff on her state law libel claims because of her admitted lack of any damages. *Id.* at 17-22. The District Court denied plaintiff's motion for summary judgment for these same reasons.

Plaintiff appealed the District Court's August 19, 1985 order. On July 24, 1986, the Eleventh Circuit reversed the District Court on the sole ground that the District Court had improperly applied Fed. R. Civ. P. 36(b) in granting the bank's motion for leave to file responses to plaintiff's requests for admission. Petitioner's Appendix B. The Eleventh Circuit remanded with direction to the District Court to apply the two-part test of Rule 36(b) in considering the bank's motion for leave to file responses. *Id.* at 12. The Eleventh Circuit did not, at that time, reach the merits of the bank's summary judgment motion.

On remand, the District Court explicitly applied the two-part test of Rule 36(b) and held that (1) the presentation of the merits of the action would be subserved by permitting the bank to respond to the requests for admission, and (2) plaintiff had failed to demonstrate that withdrawal of the "admissions" would prejudice her in maintaining her action on the merits. Petitioner's Appendix D. The District Court also concluded that it would be "manifestly unfair and grossly unjust to permit the plaintiff to obtain a judgment of the magnitude she is seeking [$1.5 million] due to the inadvertence of the defendant." *Id.* at 3.

The District Court conditioned relief upon the bank "reimbursing the plaintiff for the expenses she has incurred in connection with the appeal . . ., responding to the defendant's motion to withdraw admissions, and responding to the defendant's motion for summary judgment." *Id.* at 3-4. The court also reopened discovery for sixty days. Finally, the District Court held that should the plaintiff discover "that the delay . . . in any way affected her ability to obtain appropriate discovery, the plaintiff [would] have the right to bring such facts to the attention of the court and to seek appropriate additional relief." *Id.* at 5. Plaintiff was paid and accepted $18,275.00 as reimbursement for the expenses and attorney's fees specified.

Plaintiff subsequently deposed three present or former bank employees, served interrogatories, a second set of requests for admission, and a second request for production of documents, to which the bank timely responded.

After the close of the supplemental discovery period, the bank renewed its motion for summary judgment. Plaintiff opposed the bank's motion and moved to "reinstate Rule 36 admissions." On June 17, 1987, the Dis-

trict Court denied plaintiff's motion to reinstate the inadvertent "admissions" and granted the bank's motion for summary judgment (by adopting its prior order on the merits). Petitioner's Appendix C.

Plaintiff appealed this ruling and on February 26, 1988, the Eleventh Circuit affirmed the District Court in all respects. Petitioner's Appendix A.

Plaintiff's efforts in this case have been directed toward taking advantage of an inadvertent failure by a new staff attorney for the bank who unintentionally failed to respond to plaintiff's requests for admission. Instead of conducting discovery on the merits, plaintiff waited more than five months to file a motion for summary judgment that was based solely on the inadvertent "admissions."

Once these "admissions" were withdrawn (which covered every element of plaintiff's stated causes of action), the undisputed facts demonstrated that the bank was entitled to summary judgment. The bank does not assemble or evaluate information on consumers for the purpose of furnishing that information to third parties, except with respect to information as to the bank's transactions or experiences with its own customers. The bank does not give out information contained in credit applications bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. Most importantly, plaintiff admits that she was not denied credit as a result of the report made by the bank, was extended credit after the report was made, and suffered no monetary loss or other special damage as a result of the report.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S EXERCISE OF DISCRETION IN ALLOWING THE BANK TO RESPOND TO PLAINTIFF'S REQUESTS FOR ADMISSION.

The Eleventh Circuit affirmed the District Court's exercise of discretion in allowing the bank to withdraw "admissions" inadvertently made by failing to respond timely to plaintiff's requests for admission. Contrary to plaintiff's suggestion, this holding is in complete accord with decisions of this Court and every other circuit court, and does not involve an important question of federal law. The circuit courts have unanimously held that a district court's application of the two-part test of Fed. R. Civ. P. 36(b) is reviewed under an abuse of discretion standard. *See, e.g., Asea, Inc. v. Southern Pac. Transp. Co.*, 669 F.2d 1242, 1247-48 (9th Cir. 1981); *Warren v. International Bhd. of Teamsters*, 544 F.2d 334, 340 (8th Cir. 1976). The Eleventh Circuit properly affirmed the District Court's exercise of discretion in this case.

II. THE BANK IS NOT A "CONSUMER REPORTING AGENCY" SUBJECT TO THE FAIR CREDIT REPORTING ACT.

The text of 15 U.S.C. § 1681a(d) expressly excludes from the purview of the Fair Credit Reporting Act any credit report "containing information solely as to transactions or experiences between the consumer and the person making the report." It is undisputed that the bank only reports its transactions and experiences with its own customers. Thus, the bank is not a "consumer reporting agency" subject to the Fair Credit Reporting Act. The lower courts' holdings on this issue are in complete agreement with every other decision on point. *See Rush v. Macy's New York, Inc.*, 775 F.2d 1554, 1557 (11th Cir. 1985); *Freeman v. Southern Nat'l Bank*, 531 F. Supp. 94 (S.D. Tex. 1982); *D'Angelo v. Wilmington Medical Center, Inc.*, 515 F. Supp. 1250, 1253 (D. Del. 1981); *Peller v. Retail Credit Co.*, 359 F. Supp. 1235, 1237 (N.D. Ga. 1973), *aff'd mem.*, 505 F.2d 733 (5th Cir. 1974). Therefore, the Eleventh Circuit and the District Court correctly ruled that the bank is not a "consumer reporting agency" subject to the Fair Credit Reporting Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: Atlanta, Georgia
June 22, 1988

Respectfully submitted,

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